

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD KENNEDY	:	CIVIL ACTION
	:	
v.	:	
	:	
RAYMOND COLLERAN, et al.	:	NO. 99-CV-6273

MEMORANDUM

Padova, J. **October , 2000**

Petitioner Richard Kennedy (“Kennedy”), a state prisoner incarcerated at the State Correctional Institute in Waymart, Pennsylvania, filed a counseled Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C.A. § 2254(a). Petitioner asserts that his trial counsel provided constitutionally ineffective assistance. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, this Court, by Order dated December 23, 1999, referred the Petition to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation ("Report"). On July 26, 2000, Magistrate Judge Rueter filed a Report recommending that the Court deny the Petition as without merit. Petitioner filed Objections on August 4, 2000. The Government filed a timely response to Petitioner’s Objections on August 15, 2000. Having conducted an independent de novo review of the Report, state court record, Petition and Objections, the Government’s Responses thereto, the Court will adopt Judge Rueter’s Report, overrule Petitioner's Objections, and deny the Petition.

I. Standard of Review

Where a habeas petition has been referred to a magistrate judge for a Report and

Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

The instant Petition was filed pursuant to § 2254 which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 2000). The Petition is also governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. AEDPA made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1) (West 2000). Any determinations of factual issues made by a State court must be presumed correct, unless the petitioner provides clear and convincing evidence in rebuttal.

28 U.S.C.A. § 2254(e)(1) (West 2000).

To apply AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts must first determine whether the state court decision regarding each claim was "contrary to" Supreme Court precedent. Werts v. Vaughn, No. 98-1764, 2000 WL 1281114, at *12

(3d Cir. Sept. 8, 2000)(reaffirming the standard enunciated in Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 891 (3d Cir. 1999) following the issuance of Williams v. Taylor, 120 S. Ct. 1495 (2000) in which the United States Supreme Court construed the new standard of review set forth in section 2254(d)(1)). Only if relevant Supreme Court precedent requires an outcome contrary to that reached by the state court may the district court grant habeas relief. Matteo, 171 F.3d at 891. If the state court decision is not contrary to the applicable Supreme Court precedent, then the court must evaluate whether the state court decision was based on an “unreasonable application of” Supreme Court precedent. Id. at 890. Habeas relief may only be granted if the state court’s application of Supreme Court precedent was objectively unreasonable. Werts, 2000 WL 1281114, at *12. Mere disagreement with a state court’s conclusions is insufficient to warrant habeas relief. Matteo, 171 F.3d at 891.

II. Discussion¹

Petitioner argues that his trial counsel provided constitutionally ineffective assistance by failing to object to statements made during the prosecution’s closing remarks. During closing arguments, the prosecutor made the following statements:

Had it been my sister in Room 6114, then Dr. Kennedy would be practicing medicine somewhere with a white lab coat and a goddamn grin on his face and probably a syringe of 10 cc’s of Thiopental in his lab coat. But Karen Murphy is a nurse, and the only reason that he’s on trial today is because she’s a nurse and because she figured it out. She didn’t know what happened to her. The defense attorney in his opening said this is crazy. It is crazy. It’s absolutely maddening that this happened. A doctor, a lousy doctor in a hospital, why did he do it?

¹The Report accurately states the procedural history of Petitioner’s case and describes the factual background of the crime for which Petitioner was convicted. The Court, therefore, will not restate them here.

Cause he could do it. Because he made one mistake when he did this, one mistake: He left the Surgilube behind. you go in to rape a woman, of course, you are going to make a mistake. And that's the mistake that he made.

Had it been anyone but a nurse, he would have gotten away with it.

Why did he do it?

Why did you do it?

Cause he could do it. Cause there's some all-powerful thing about a medicine man in a room. And he could do it. He picked the time, he set her up, he made contact with her, he did a dry run on the 16th of June, and he came in and he did it.

(N.T. June 20, 1995 at 88.) Petitioner argues that the question “Why did you do it?” constituted impermissible commentary on his failure to testify at trial in violation of his right against compulsory self-incrimination. According to Petitioner, his trial counsel’s failure to object to the prosecutor’s remark constituted ineffective assistance of counsel. Magistrate Judge Rueter recommends that Petitioner’s argument is without merit² and the Court agrees.

Petitioner raised this issue on appeal before the Pennsylvania Superior Court who denied his claim as without merit. Commonwealth v. Kennedy, No. 3510 Philadelphia 1995, at 14 (Pa. Super. Ct. Nov. 15, 1996). The Superior Court applied the test outlined in Commonwealth v. Buehl, 658 A.2d 771 (Pa. 1994), that requires demonstration that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for the act or omission in question; and (3) but for counsel’s act or omission, the outcome of the proceedings would have been different. Id. at 777; Kennedy, No. 03510 Philadelphia 1995, at 13. The court stated that comments by prosecutors do not constitute misconduct “unless the language is such that ‘its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant, so that they could not weigh

²Petitioner objects to all of the legal conclusions and recommendations in Magistrate Judge Rueter’s Report.

the evidence and render a true verdict.” Kennedy, No. 03510 Philadelphia 1995, at 14 (quoting Commonwealth v. Hardcastle, 546 A.2d 1101, 1109 (Pa. 1988)). The Superior Court determined that the remarks did not draw attention to the fact that Kennedy did not testify, nor implied that Kennedy’s silence constituted an admission of guilt. Kennedy, No. 03510 Philadelphia 1995, at 14. Rather, the court concluded that the prosecution was attempting to imply that the evidence led to the single conclusion that the defendant was guilty. Id. at 15.

The United States Supreme Court has articulated the test for ineffective assistance of counsel under the United States Constitution in Strickland v. Washington, 466 U.S. 668 (1984). Werts, 2000 WL 1281114, at *18. To prevail, a defendant must show both deficient performance and prejudice. Strickland, 466 U.S. at 700. First, the defendant must show that his counsel’s performance fell below an objective standard of reasonableness judged in light of the facts of the particular case at the time the conduct occurred. Id. at 688-90. Second, the defendant must demonstrate that he was actually prejudiced by counsel’s deficient performance. Id. at 687. To establish actual prejudice, the defendant must show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694. The defendant must prove both elements to successfully assert an ineffectiveness claim. Id.

The rule announced in Strickland qualifies as “clearly established Federal law, as determined by the Supreme Court of the United States.” Williams v. Taylor, 120 S. Ct. 1495, 1512 (2000). The Supreme Court has also clearly established that a prosecutor may not comment on the accused’s silence, Griffin v. California, 380 U.S. 609, 615 (1965), or suggest to the jury that it may treat the defendant’s failure to testify at trial as substantive evidence of guilt, Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). United States v. Robinson, 485 U.S. 25, 32 (1988). The prosecution may violate

the defendant's privilege against compulsory self-incrimination where he asks the jury to draw an adverse inference from a defendant's silence unless the reference is "a fair response to a claim by defendant or his counsel." Id.

Petitioner is entitled to relief only if the Pennsylvania courts' decisions rejecting his claim was either contrary to or involved an unreasonable application of these established laws. See Williams, 120 S. Ct. at 1512. Upon analyzing the law set forth in the Superior Court's decision, the Court determines that the state court did not apply a rule that contradicts the Supreme Court's holding in Strickland or Robinson. Strickland requires proof of an arguably meritorious underlying claim. See Kimmelman v. Morrison, 477 U.S. 365, 382 (1986); United States v. Baird, 218 F.3d 221, 225 (3d Cir. 2000). Furthermore, Strickland requires demonstration of deficient performance below an objective level of reasonableness and actual prejudice. Strickland, 466 U.S. at 687-90. The Superior Court's statement of the applicable law conforms with these dictates.

The Court also concludes that the Superior Court's application of Strickland and Robinson to Kennedy's claim was objectively reasonable. The prosecution posed a rhetorical question that did not directly address Petitioner's failure to testify. Rather, the question speculated as to Petitioner's motive for committing the crime. Most importantly, the prosecution immediately answered the question. The Superior Court could have reasonably determined that the comment did not suggest that Petitioner's failure to testify was substantive evidence of guilt, but rather attempted to convince the jury that the circumstantial evidence against Petitioner established guilt and motive.

Furthermore, the prosecution's remarks were made in rebuttal to comments made by Petitioner's trial counsel. In his opening statement, defense counsel stated:

In order for you to believe the prosecution's case, you would have to

believe that when the shifts are changing, and there are no locks on these doors in the hospital, right, that my client is going to drug this woman and then take down her pajamas, take down her panties, drop his pants, and mount this woman in the hospital. Well, that's crazy. When he's walking around with this drug, Thiopental, and saying who can I drug this morning to have sex with. Come on. This man here has been in the medical profession most of his adult life. Was once a nurse, is now a doctor. He didn't drug no patient and have sex with her. That's crazy.

(N.T. June 12, 1995 at 3.) Defense counsel clearly asserted that Petitioner would not have committed the crime for which he was charged because he is a doctor. The prosecutor's closing remarks explicitly referred back to this assertion by defense counsel in an attempt to discredit defense counsel's theory. (See N.T. June 20, 1995 at 88.) Under Robinson, the prosecution's remark was permissible. Robinson, 485 U.S. at 32. Defense counsel's failure to object and raise a meritless argument, therefore, did not constitute ineffective assistance of counsel under Strickland.

Even if the prosecutor's remark did wrongfully infringe upon Petitioner's right not to testify at trial, no prejudice inured from the remark. First, the statement was a short remark made during the beginning of the prosecutor's argument that covered 22 transcript pages and lasted for 30 minutes. In this context, the statements did not infect the trial with unfairness sufficient to make the resulting conviction a denial of due process. See e.g. United States v. Carter, 953 F.2d 1449, 1467 (5th Cir. 1992). Second, the trial court provided curative final instructions. The court instructed the jury that the defendant is presumed innocent and need not produce any evidence in his own defense. (N.T. June 20, 1995 at 112-13.) Most importantly, the court warned the jury that "it is entirely up to each defendant whether or not to testify. Our Constitution gives each one of us the right to remain silent, and you must not make any inference of guilt from the fact that a person does not testify." (Id. at 118.) Jurors are presumed to follow the court's instructions. Weeks v. Angelone, 120 S. Ct. 727,

733 (2000). Furthermore, jury instructions can negate any prejudice from improper comments about a defendant's failure to testify. United States v. Dansker, 537 F.2d 40, 62-63 (3d Cir. 1976).

For these reasons, the Court concludes that the Superior Court's decision rejecting his claim was not contrary to established law nor involved an unreasonable application thereof. Petitioner, therefore, is not entitled to habeas corpus relief on his claims. The Court adopts Magistrate Judge Rueter's Report, overrules Petitioner's Objections, and denies the Petition. An appropriate Order follows.